United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

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74-2594

To be argued by
SAMUEL H. DAWSON

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2594

UNITED STATES OF AMERICA,

Appellee,

—against—

JACQUELINE DOZIER,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE

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Preliminary Statement

This is an appeal from a judgment of conviction entered on December 6, 1974 in the United States District Court for the Eastern District of New York (Judd, *J.*) convicting the appellant Jacqueline Dozier as charged in a one count indictment of aiding and abetting the possession of cocaine with intent to distribute, Title 21, United States Code, § 841(a)(1), and sentencing her under the Youth Corrections Act, Title 18, United States Code, § 5010(e), to a 90 day period of study and observation. Execution of the sentence has been stayed and the appellant is at liberty pending appeal.

On this appeal, appellant does not challenge the sufficiency of the evidence against her; rather it is alleged that the trial court (1) erred in giving the jury the "conscious avoidance of knowledge" instruction; (2) erred in instructing the jury as to appellant's credibility as a witness; (3) improperly marshalled the evidence; and finally (4) that only eleven competent jurors decided the case.

Statement of Facts

A. The Government's Case-in-Chief.

At trial, the Government's witnesses testified to the following facts:

On the evening of December 11, 1973, Michael Bergin, a New York City police officer assigned to do undercover work with the Drug Enforcement Administration Task Force, telephoned one Mary Lou Dantzler * and inquired about the possibility of his purchasing one-eighth of a kilogram of cocaine from her (4).** The telephone conversation proving inconclusive, Bergin and his brother police officer Joseph Miller,*** who was also assigned to the Task Force, went to Dantzler's residence on President Street in Brooklyn, to further negotiate for the cocaine (4-5). Dantzler explained to Bergin and Miller that she had not been able to reach her source for the cocaine and the officers subsequently left the apartment (6). Bergin telephoned Dantzler later on that same evening and finally confirmed the arrangements for the purchase of the drugs now scheduled to take place the next night outside of Dantzler's residence (7).

The next night the officers arrived at the premises and saw appellant standing outside with Dantzler. According to Bergin, who was driving the car, Dantzler and appellant walked up to the driver's side of the car and stood side by

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* Dantzler, who was indicted with the appellant, pleaded guilty just prior to trial.

** Page numbers in parenthesis refer to the transcript of trial.

*** Miller, subsequent to the arrest in this case had been suspended by the Police Department. A prostitute that Miller had arrested alleged that he had taken five dollars from her. Miller was reinstated after the prostitute, who had twice failed to appear in support of her complaint, told her story to a New York State grand jury which dismissed the matter. See transcript at 108 for the number of commendations the officer has received.

side while he conversed with Dantzler in a normal voice (8-10, 29).* Bergin asked Dantzler if she had the package. Dantzler replied that she was ready to do the deal but that it would take place at another location. She informed Bergin that, while she went to get the package, appellant would go with the men and show them the location. Additionally, she stated that all she could get was about two and and a half ounces of cocaine which would cost Bergin $1,400 (10-11).

The appellant got into the car and directed Bergin to their ultimate destination, a movie theater on Eastern Parkway in Brooklyn. When Bergin realized that the location for the deal was to be inside the theater he told appellant that he wanted "to do the dealing in the car" rather than inside where there are so many people (12, 34). Appellant assured both men that the movie theater was all right and "cool", a "better place to do it than the street" (12). With that, all three left the automobile. Bergin took from inside the vehicle the money to be used to purchase the cocaine and told appellant that he was placing it in the automobile's trunk, which he did (13). They all entered the movie house and stood by the rail waiting for Dantzler to arrive (13). During the approximately fifteen minutes that elapsed waiting for Dantzler, appellant reassured the men that Dantzler would show up with the package and that Dantzler did

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* Bergin testified that he double parked the car. Appellant asserts that Miller, in contrast, testified "that Bergin did *not* double park (Appellant's Brief, p. 4) (Emphasis in original). However, Miller on cross-examination stated that Bergin double parked and then pulled into a parking space (100). The significance of any claimed inconsistency is obscure. In addition, Officer Bergin did not testify that appellant stood approximately three feet away while he and Dantzler talked (Appellant's Brief, p. 3), but rather that *all* three of them were within a two to three foot radius of one another at the side of the car (9, 29). On cross-examination he stated that appellant and Dantzler were standing "right next to each other" (29).

"straight business" (13-14, 68, 80). When Dantzler finally arrived and acknowledged that she had the cocaine on her person, she and Bergin went into the men's bathroom. Miller and appellant stood outside the bathroom, blocking the doorway (15-16, 81).

Inside the men's room Bergin examined the package to determine whether or not "the stuff [was] good" (17-18). Because Dantzler refused to leave the theater and accept payment outside by the automobile, Bergin came out of the bathroom with Dantzler and directed Miller to go out to their vehicle and get the money (17). While Bergin, Dantzler and appellant were waiting in the lobby for Miller to return, a man came into the theater shouting a warning that the police were coming in (20, 49). This individual turned out to be Dantzler's brother, Leroy Dantzler (49). A short time after Leroy Dantzler came running into the movie house, Miller and the surveillance officers came in and effected the arrests of both Dantzlers * and the appellant (19, 49-50). Bergin seized the package of cocaine that Mary Lou Dantzler had let drop to the floor (19).

Finally, the Government introduced a stipulation wherein it was agreed that if Roger Godino, a Government chemist were called, he would testify that the package seized contained 67.40 grams of cocaine hydrochloride (110-110a).

B. The Defense Case.

The appellant testified on her own behalf (113-168). She said she attended Medgar Evers College and was enrolled in the Manpower Adult Training Program (115).

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* A complaint was filed, charging Leroy Dantzler with aiding and abetting Mary Lou Dantzler in the possession of cocaine with the intent to distribute (Title 21, United States Code, § 841 (a)(1). The complaint was dismissed on motion of the Government on March 18, 1974.

Appellant went to Mary Lou Dantzler's home on December 12, 1973 but could not give any reason for going there (115, 117).* While there she helped Dantzler with some Christmas decorating and was asked by Mary Lou if she would show two of Dantzler's friends where the Cameron [sic] movie theater was (120). A short time thereafter they went downstairs to await the arrival of Mary Lou's friends. After waiting approximately five minutes Bergin and Miller pulled up in their car and double parked (122). According to appellant, Dantzler went out into the street alone and talked to Bergin while she remained on the sidewalk (123). When Mary Lou waved her over she came and was introduced to both men. Dantzler told the men that appellant would show them where the theater was (124). Appellant went into the automobile and Dantzler walked away. She testified that she did not ask Dantzler where Mary Lou was going or why she was leaving (151). Bergin was directed to the movie house by appellant and the only conversation enroute that she could recall was Miller asking her where did Mary Lou go (125). They entered the theater and waited for Dantzler to arrive. Though approximately twenty minutes went by before Mary Lou came, appellant stated that the wait did not cause her any concern (162). When Dantzler finally came she and Bergin went into the men's bathroom together, an event that d not strike appellant as odd. However, she conceded that she really did not want to know why they did that (164-165). When Bergin and Dantzler returned, Miller and Bergin had a conversation which appellant did not hear. Miller exited the movie house only to return in a few minutes with the other police officers to effect the arrests (135).

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* Appellant conceded that she did not tell her mother she was going to Dantzler's apartment (142). Furthermore, appellant's mother testified that appellant told her she was going to a "Kathy's" house to study, which apparently was a lie (207).

C. The Government's Rebuttal Case.

In rebuttal, Mary Lou Dantzler testified for the Government (169-203). Dantzler stated that appellant appeared at her apartment on December 12, sometime after nine in the evening. Mary Lou advised her of the momentary arrival of two men to whom she was going to sell cocaine. Dantzler said that appellant should take the two prospective purchasers to the movie theater while she picked up the cocaine from another location (170-171). As to events in the movie, Dantzler substantiated most of the officers' testimony. She admitted to a prior history of drug addiction and to her having been in a drug rehabilitation program (176, 182).*

D. The Deliberation of the Jury.

After closing argument the Court instructed the jury as to the applicable rules of law to which no objection was raised by either side (3-18).** After deliberating for a while, the jury sent the following question to the Court:

> If the defendant went to the theater thinking there was an illegal transaction but had no idea it was cocaine, does this make a difference? (19).

Before responding to the jury's question, the Court expressed the view to counsel that:

> I think since it's a drug case and it has a more serious penalty than others, I think she either had to know that it involved some narcotics or been consciously keeping herself from knowing what it was. She couldn't go there believing that it was just a

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* Jocelyn Dozier, appellant's mother, testified in surrebuttal that several days after the arrest she initiated a telephone conversation with Dantzler. When asked by Mrs. Dozier if appellant was involved in the crime Dantzler said she was not (205).

** Numerical references to the charge are to pages in the transcript dated September 24, 1974.

> couple of forged checks that was going to be transferred. I think they slowly [sic] bear in mind the rule on knowledge that no person can avoid knowledge by closing his eyes by facts which should prompt him to investigate. It was a neighborhood where everybody has cocaine and that's what she may well have suspected (19).

Defense counsel did not take issue with the Court's statement, but merely suggested that in a drug case an aider and abettor must know that he is aiding and abetting a drug transaction. Therefore, counsel suggested that the answer to the jury's question would be, "yes" (20). The Court agreed with counsel that knowledge of a drug transaction was required but noted that knowledge may be either actual knowledge or "deliberately closing your eyes" (20).* The Court then instructed the jury as counsel had suggested, that appellant's belief that she was aiding and abetting in something other than a drug transaction would "make a difference", and could not justify a conviction (20-21).** No objection was taken to this supplemental charge.

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* The colloquy was as follows:

> "Mr. Gutman [Defense Counsel]: I think the specific question that the jurors are asking, do you have to know it's drugs when you are aiding and abetting in a drug case, and I think the answer is yes.
>
> The Court: Except that knowledge may be either actual knowledge or deliberately closing your eyes.
>
> Mr. Gutman: The jury asked whether she thought it was something else.
>
> The Court: I'll give them a full answer. I think I'll cover both. Bring them in." (20).

** The full charge was:

> "The Court: Miss Cannell, and ladies and gentlemen, sorry I kept you waiting. It took some time to get everybody together and do some studying to make sure my answer would be as right as I could make it. My experience has been jurors ask experienced questions. "If the

[Footnote continued on following page]

The jury returned twice more, first to state that it could not reach agreement on a verdict and subsequently to tell the Court that one juror would not discuss the case because a decision regarding the guilt of another person was reserved to God. In response to this latter revelation the Court reminded the jurors of their oath and their obligation under it. Additionally the Court noted that it was not the Court's intention to force any juror to abandon his or her religious beliefs or any juror's vote on the guilt or innocence of appellant. Rather, the Court instructed the jury that a juror could not simply refuse to vote (25-26).* The jury

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defendant went there thinking there was an illegal transaction but had no idea it was cocaine does this make a difference?" I would say it does make a difference to the extent there are different penalties for different crimes, so I don't think aiding and abetting in something less than drugs could justify a conviction here, but cocaine and heroin are in the same category. If she believed it was guilt of aiding and abetting; and what I said about knowledge should be considered. Knowledge may be proved by a defendant's conduct and by all of the facts and circumstances surrounding the case. No person can intentionally oppose knowledge by closing her eyes to facts that should prompt her to investigate. So in order to convict you have to find either that she knew that some kind of narcotic drug was involved not necessarily by the time she went to the theater but by the time, if you believe the Government agent's testimony, that she reassured the Government agent that Mary Lou would be coming, she must have either known that either there was a narcotic drug involved or had knowledge of sufficient facts that she was justifying to prevent herself from having knowledge, deliberately closing her eyes. I hope that will help you to decide it. . ." (20-21)

* "The Court: Miss Cannell, ladies and gentlemen. I have your note that one juror finds that there is no way for one person to make a decision on anyone else's guilt, that decision is reserved for God. I have sometimes excused people from serving at all as jurors if they told

[Footnote continued on following page]

went back for further deliberations and shortly thereafter returned with a guilty verdict. Appellant raised no objection to the Court's instruction.

ARGUMENT

POINT I

The trial court did not err in giving the jury the "conscious avoidance of knowledge" instruction.

After defining "aiding," "abetting" and "knowingly", Judge Judd instructed the jury on the question of the appellant's "guilty knowledge" as follows:

> I refer to the word knowingly, knowledge can be proved by a defendant's conduct and by all the facts

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me that when they are summoned to serve. I didn't ask the question that I sometimes ask, whether there is any juror who would be unwilling or unable to bring in a verdict of guilty if convinced of guilt, or a verdict of not guilty if left with reasonable doubt at the end of the case but I did ask whether there was any juror who knew any reason why he or she couldn't fairly act as a juror in this case and the one who is unwilling to decide should have disclosed it at the time. The oath that you all took, you and each of you do so solemnly swear that you will well and truly try this case before you and a true verdict rendered. That means that you promised to decide it and I think under those circumstances it is necessary to reach a decision. I can't force anybody to act contrary to his religious beliefs in God, it's something that the Court should have known before, and I think there is a duty to make a decision, to vote one way or the other. I'm not saying that you should give up a vote that you believe in because you are in a minority, but I do say you can't simply say, I'm not going to vote.

I'm going to ask you to go back for another half-hour to see what you can do. Please go back to the jury room." (25-26).

and circumstances surrounding the case. No person can intentionally avoid knowledge by closing his eyes to facts which should prompt him to investigate; and so, knowledge can be established by direct or circumstantial evidence just as any other facts in the case, and you can consider the peculiarity if you consider as such of going to a theater with a couple of strange men without the one who introduced him to you at 10:00 o'clock at night, in the middle of the second show and see whether that is a circumstance that implies knowledge that there was a cocaine transaction to take place in an area where Miss Dozier, Sr. said cocaine was all over the neighborhood, or whether it was just an adventurous girl who thought here was a chance to go out, she had an older friend and she would have an interesting time. If you find from all the evidence beyond a reasonable doubt either that the defendant knew that she was helping in a cocaine transaction, or that she had a conscious purpose to avoid finding out the identity of the substance so as to close her eyes to the facts, you could find sufficient evidence to find her guilty beyond a reasonable doubt. But it's up to you whether there is a reasonable doubt (9-10).*

Appellant contends that before criminal liability attaches under Title 21, United States Code, Section 841(a)(1), *actual* knowledge that the item is a "controlled substance" must be shown.** However, since this Court has recently

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* See also supplemental charge, *supra*, at 7-8n.

** Title 21, United States Code, Section 841(a)(1) provides in pertinent part:

> Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute or dispense, a controlled substance. . .

turned back several challenges to the "conscious avoidance of knowledge" charge, (*United States* v. *Olivares-Vega,* 495 F.2d 827 (2d Cir. 1974); *United States* v. *Joly,* 493 F.2d 672 (2d Cir. 1974)), this contention is not pressed too far. Appellant concedes as well she must, that in certain factual settings "a conscious avoidance of knowledge" may amount to an awareness of a high probability of the existence of the critical fact, so as to justify the inference of knowledge of it. *Turner* v. *United States,* 396 U.S. 398, 416, n. 29 (1970); *Leary* v. *United States,* 395 U.S. 6, 46, n. 93 (1969); *United States* v. *Joly, supra,* 493 F.2d 672 at 676; *United States* v. *Jacobs,* 475 F.2d 270, 287-288 (2d Cir. 1973), *cert. denied, sub. nom. Thaler* v. *United States,* 414 U.S. 821; *United States* v. *Squires,* 440 F.2d 859, 863 (2d Cir. 1971).

Appellant asserts however, that the deliberate avoidance of knowledge charge is only appropriate in a case where the defendant is faced with a simple either/or fact question. Where, the argument continues, a defendant is faced with a multiple of possibilities as to the nature of the item involved and, in addition, there is no basis in fact for any inference of knowledge, then the purposeful avoidance of knowledge fails to create the equivalent of knowledge.

As to the first contention, the *Joly* court expressly rejected the argument that the inference of knowledge disappears when the alternatives multiply. *United States* v. *Joly supra,* 493 F.2d at 675. While a multiplication of possibilities may erode the inference, it's legitimacy "does not automatically disappear because other evidence arguably points the other way" (493 F.2d at 676). On the facts presented in *Joly* this Court concluded that "the jury was properly allowed to infer Joly's knowledge that he possessed cocaine." 493 F.2d at 677.*

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* As stated at 493 F.2d 672, 676-677:

> [A] possibly manufactured story about a non-appearing "Miquel", an admission of awareness of "doing something wrong" and a promise of payment of $100 for taking a small package past customs.

Again in *Olivares-Vega, supra,* 495 F.2d at 830, it was argued that:

> "An inference of knowledge that narcotics were being transported is not possible where a number of equally supportable possibilities as to the contents of a container exist (jewelry watches, gold, etc.)"

Upon consideration of the facts of that case.* and the recent precedent of *Joly,* this Court rejected the argument and upheld the "conscious avoidance" charge again.

It is important to note that the charge given by Judge Judd was more generous to the appellant than those approved in *Joly* and *Olivares-Vega.* The charge in those cases characterized the deliberate avoidance of knowledge as the "equivalent of knowledge." Here, the trial court simply instructed the jury that in order to convict they would have to find that appellant either knew that some kind of narcotic drug was involved or had knowledge of sufficient facts that she was just trying to prevent herself from having actual knowledge. (See transcript of charge at 21).

A reading of the entire charge and the supplementary instruction reveals that the jury was not permitted to convict if they found appellant to be actually ignorant of the nature of the transaction she was aiding and abet-

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* The Court (495 F.2d 827, 830) concluded that the following facts justified the "conscious avoidance" instruction:

> [A]ppellant was a long time airline employee; the suitcases seemed unusually heavy to him by his own admission; be testified he was propositioned twice by Galardo, a fellow worker to take the suitcases to a hotel in New York; and according to his own story he would receive $300 for delivering the suitcases to an unknown party in New York".

ting.* In response to the jury's question the court carefully pointed out that it *would* make a difference if appellant thought something *other* than narcotic drugs were involved. The court earlier cautioned the jury that if they should find that appellant believed she was out with some men on a theater date then that would not be aiding and abetting in the sale of cocaine.

Appellant further claims that there is no factual basis in the record for the inference. *Joly* and *Olivares-Vega* are said not to control because she was never in actual possession of the drugs. Admittedly, appellant never had actual possession of the cocaine. At best her lack of possession is merely "other evidence" arguably pointing away from the strong inference of knowledge (*Joly, supra,* at 676). The evidence presented against appellant was sufficient to permit the jury to infer that she knew that she was aiding and abetting a narcotic drug transaction. The officers were informed by Dantzler in appellant's presence that all Dantzler could sell them was two and a half ounces of cocaine and that appellant would direct them to where the *deal* would take place. When the officers voiced concern about completing the deal in a movie theater appellant assured them that it was better to do it inside than on the street. When Dantzler arrived and acknowledged possession of the package, appellant blocked the entrance to the men's room with Miller while her friend and Bergin went in. The inference is buttressed by her own admission that she took two strange men to the theater; by her lie to her mother as to where she was going; by her statement that she did not find it odd that her girlfriend and officer Bergin went into the men's bathroom

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* Indeed, the jury was charged that:

"... the purpose of the word knowingly is to be sure that no one will be convicted for an act that's done because of mistake or accident *or other innocent reason.*" (Transcript of charge, at p. 7) (Emphasis added).

together; and her concession that *she did not want to know* why they did that.

The appellant has failed to convincingly demonstrate why this Court's recent and carefully considered opinions in *Joly* and *Olivares-Vega* should not control. The instructions given by the trial Court, which were never the subject of objection, were in keeping with the holdings of those cases and should reaffirmed. Much less, should the conviction be reversed in view of the evidence that appellant had actual knowledge of the impending cocaine sale.

POINT II

The trial court (A) correctly instructed the jury on the assessment of witness credibility and (B) objectively marshalled the evidence.

(A)

Appellant's assertion notwithstanding (Appellant's Brief, p. 17) * the trial court did not instruct the jury that appellant was an incredible witness. Surely, if such was the case, counsel below would have objected, and no objection whatsoever was raised to any portion of the Court's charge. *United States* v. *Aloi*, — F.2d — (2d Cir. Slip Opinion, 6057, 6072, January 31, 1975).

It is contended that the one page separation between the instruction regarding the evaluation of appellant's testimony from that on evaluating other witnesses, was a clear invitation to the jury to evaluate what appellant said by some different, though unarticulated standard. How-

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* Judge Judd charged:

"You could consider deep personal interest that every defendant has in the result of a case in weighing the testimony." (10).

ever, such an inconsequential spatial arrangement cannot be viewed as error.

Any influence generated by the positioning of this charge was much too fine to be perceived. Appellant points to no authority holding it to be error to split the charge on credibility. To construct a claim of prejudice on so slender a speculation is to give the trial court's charge too much credit and the jury too little.

It is further claimed that whatever error may have been committed by such segregation was compounded by the court giving the jury the standard "interested witness instruction". The jury instruction that a defendant has a deep personal interest in the outcome of a trial has been repeatedly upheld by this Court, *United States* v. *Tyers*, 487 F.2d 828 (2d Cir. 1973) (defendant's special interest); *United States* v. *Mahler*, 363 F.2d 673 (2d Cir. 1966) (deepest, greatest interest); *United States* v. *Sullivan*, 329 F.2d 755 (2d Cir.), *cert. denied*, 377 U.S. 1005 (1964) (defendant vitally interested); and was long ago sanctioned by the Supreme Court (*Reagen* v. *United States*, 157 U.S. 301, 305 (1895)). Counsel below made no objection to this standard charge. The instruction in the present case dealt with the interest that *a* defendant has in the outcome of a trial, and did not focus on, much less magnify this appellant's interest. In any event, the court charged the jury that notwithstanding a defendant's interest in the result, a defendant who testifies may *well* be telling the truth, and that it was for the jury to weigh all the circumstances (11).

In contrast, the court cautioned the jury not to attach any greater weight to the police officers' testimony merely because of their status (13). Moreover, the court pointed out that they could be wrong, insensitive, attempting to build a strong case, or even outright lying (14). Viewed in the context of the entire charge, the instruction was

neither unfair nor misleading. *United States* v. *Mahler*, *supra*, at 678.

(B)

The trial court's brief mention of the evidence in its charge can hardly be called a marshalling of the evidence. The court indicated that since it was a fairly short trial it would not comment on the evidence. For sure, the court did place before the jury the essence of the case when it instructed:

> . . . If she knew beforehand that there was a cocaine transaction in the offering and she took the two men to the Kameo Theater for the purpose of having cocaine passed there, that was a helping; if she thought it was a theater date and she was just going out with a couple of men that would not be aiding and abetting in the sale of cocaine.
>
> I refer to the word knowingly, knowledge can be proved by a defendant's conduct and by all facts and circumstances surrounding the case. No person can intentionally avoid knowledge by closing his eyes to facts which should prompt him to investigate; and so, knowledge can be established by direct or circumstantial evidence just as any other facts in the case, and you can consider the peculiarity if you consider as such of going to a theater with a couple of strange men without the one who introduced him to you at 10:00 o'clock at night, in the middle of the second show and see whether that is a circumstance that implies knowledge that there was a cocaine transaction to take place in an area where Miss [sic] Dozier, Sr. said cocaine was all over the neighborhood, or whether it was just an adventurous girl who thought here was a chance to go out, she had an older friend and she would have an interesting time . If you find from all the evidence beyond a reasonable doubt

> either that the defendant knew that she was helping in a cocaine transaction, or that she had a conscious purpose to avoid finding out the identity of the substance so as to close her eyes to the facts, you could find sufficient evidence to find her guilty beyond a reasonable doubt. But it's up to you whether it is a reasonable doubt (8-10).

It is clear that the charge in the segment just quoted, and in its entirety was neither argumentative nor adversarial. The jury merely had their attention directed to the key question to be resolved. *Quercia* v. *United States,* 289 U.S. 469-470 (1933). It is hard to imagine how the matter could have been more squarely put. To characterize this "presentation" as "jaundiced", as appellant does, is to misapprehend the traditional role of a federal judge. *United States* v. *Curcio,* 279 F.2d 681 (2d Cir. 1960). The trial judge stayed within proper bounds when he sought to place into focus the competing claims of the parties. *United States* v. *Tourine,* 428 F.2d 865, 869 (2d Cir. 1970). The fairness of the Court's effort should be examined in the context of the entire record. So examined it is abundantly clear that the court below did not abuse it's power to comment upon the evidence. The trial court made plain both at the outset of the charge and at its conclusion that the jury was the sole judge of the facts (4, 16). Furthermore, the court noted that whatever *it* may have said regarding the facts did not bind or control the jury (14). Appellant raises no claim that important evidence was left out of the instruction or that certain evidence was overstated.

We are told however, that the court expressed its opinion as to appellant's guilt. It is hard to imagine how, if this "opinion" was "effectively camouflouged as objective marshalling" it impinged upon the jury's role. Nowhere has it been demonstrated that the court had adopted the Government's theory or discredited the appellant's. The court in

this simple and short trial did not coerce the jury into accepting any view of the facts.

The jury had before it appellant's contention that she was just a dazzled schoolgirl out for an adventure with two strange men. The jury chose instead to believe that she helped her friend to do "straight business" by attempting to sell cocaine.

POINT III

Appellant was convicted upon the verdict of twelve competent jurors.

The appellant's right to a trial by an impartial and competent jury was in no respect abridged or diluted. During the jury selection process the trial court advised the entire panel of prospective jurors that they must be impartial and decide the matter solely on the basis of the evidence (6).* Repeatedly, the trial judge queried the panel members as to the existence of any fact or circumstance that would effect their ability to be fair and impartial jurors (20, 31). Finally, at the conclusion of the jury selection counsel were afforded an opportunity to have additional questions put to the jurors. Counsel for appellant did not avail himself of this opportunity and declared that the jury was satisfactory to the defense (48-49). After hearing testimony for a day and a half the jury was instructed on the law and commenced its deliberations. After several hours of deliberation the jury sent a note to the Court questioning the degree of appellant's knowledge as to the nature of the illegal transaction (20-21).** The question posed by the jury "reveals that the jury had focused on the key issue in the case." (Appellant's Brief,

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* Page references are to the transcript of the voir dire conducted on September 19, 1974.

** Page references is to the transcript of the Court's charge and supplemental instruction.

p. 11). This note makes clear that the jury was actively engaged in the deliberative process and more precisely, was screening the evidence as counsel had suggested in closing argument. No hint was raised in this note to the court that any juror refused in the hours past, to participate in the decision-making process. The jury sent a second note to the Court, this time requesting that certain testimony be read back.*

This testimony (of both police officers and the appellant) when placed alongside the first jury note gives insight into the jury debate. It is obvious that the jury was gauging the credibility of the witnesses, an issue which they eventually resolved against the appellant. However, it is this careful, searching and sometimes plodding inquiry that is the essence of the decision-making process. Juries do not reach a verdict by traveling a straight line or by a route that may seem more logical or appealing to court and counsel. To some jurors, particularly new jurors, the process and their role, may seem complex. Indeed, for some jurors the casting of a vote may be a painful duty since it is a heavy responsibility to sit in judgment of another person. Here, one juror after participating in several hours of deliberations and after rehearing testimony, sought to avoid what must have been for that juror an unpleasant task; namely, calling the appellant in effect a perjurer and declaring her guilty as charged. No information was brought to the court's attention indicating that any juror had been sitting intransigent from the very beginning of deliberations, unwilling or unable to participate or engage in the jury's discussion. It was only after several hours of deliberation that the matter of a juror's refusal to vote was called to the court's attention. That note to the court is important for what it does not say. It does not state that a juror has refused to discuss or debate the case. It does

* See Court Exhibit No. 3, Appellant's Supplemental Brief.

not indicate that a juror was confused as to the law or had no belief at all on the issue of guilt or innocence. Rather, it is clear that this juror was seeking refuge from what was an unpleasant duty. This last re[illegible]ne clear when, after receiving instruction from t[illegible]rding the jury's duty to decided the case if it coul[illegible]4)* the jury sent out it's final note indicating that th[illegible]uror felt a decision as to guilt was reserved to God (25-26). The trial court, as delicately as it could, made clear to the jury as a whole that it would not force any juror to act contrary to his or her religious beliefs. Furthermore, the court pointed out that if the juror had a viewpoint on the issue of guilt or innocence based upon the evidence, then the juror should not abandon that position merely because it was a minority view (25-26).

Counsel for appellant below did not see fit to raise any objection either to the court's instruction or the sending the jury back for further deliberation. No application for a mistrial was made by counsel in light of the jury's final note, nor did counsel have any suggestion as to a more appropriate course of action to be followed. Shortly thereafter the jury returned a verdict of guilt. It is abundantly clear that the juror had no disagreement with the other jurors as to the merits of the case. If the juror had a contrary position as to the weight of the evidence it surely would have been reinforced by the court's admonition that such a position should not be abandoned merely because it was a minority view. But the rapidity with which the verdict followed on the heels of the court's final instruction indicates that the juror entertained no such doubt as to innocence. The court's reminder to the jury that they each had sworn on oath to fairly and impartially decide this

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* Trial counsel for appellant raised no objection to the Court's remarks. No application for a mistrial was made; nor did counsel suggest to the court that he desired any particular instruction in place of or in addition to the one given.

case and that deciding meant voting was nothing more than a statement of the obvious obligation that all jurors have.

The court directed that the jury be polled, and each juror in turn verified and affirmed the verdict (28-29). In *United States* v. *Pleva,* 66 F.2d 529 (2d Cir. 1933), a hold-out juror stated during the polling of the jury that he had abandoned his position only because of his concern that the deliberations were taxing his health. In the instant case no statement of any kind was made by any juror during the poll other than assent to the verdict. Moreover, in *Pleva,* unlike the present case the verdict was recorded over the *objection* of counsel.

Appellant was tried by twelve competent jurors. Rule 23(b), Fed. R. Cr. P. Therefore, appellant's reference to cases such as *United States* v. *Vega,* 447 F.2d 698 (2d Cir. 1971) and *United States* v. *Guerrero-Peralta,* 446 F.2d 876 (9th Cir. 1971) misses the point. This is not a case where as in *Vega* a hold-out juror who was dismissed gave rise to the question as to whether or not a defendant validly waived trial by twelve jurors. Nor is it a situation similar to the one in *Guerrero-Peralta,* where with one juror disqualified during deliberations, only defense counsel agreed on the record to a verdict by eleven rather than twelve jurors.*

Appellant's claim of juror incompetence is bottomed on nothing more than a number of speculations regarding the

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* It is interesting to compare the desire of counsel to have a verdict in *Vega* and *Guerrero-Peralta* with the silence of counsel here. No waiver of twelve jurors was proposed or offered. Rather, it was no doubt hoped that a deadlock would result, and a mistrial of necessity declared. To now contend that a juror who had spent a day in deliberation and who apparently exhibited a sensitivity to appellant's plight, should therefore be declared "incompetent", is certainly an inflation of what occurred below.

juror's alleged failure to deliberate. It is suggested that the juror failed to consider the case from the *very beginning* of the deliberations. Moreover, it is said this refusal to participate was a *rigorous* effort on the juror's part, though the basis for this assertion is nowhere set forth. Finally, this ability of appellant to see not merely through the wall of the juryroom but into the very mind of the juror, culminates in the assertion that the juror was *unable* to weigh the evidence in his own mind.

Appellants footnote suggestion of a ~~demand~~ remand * is clearly at odds with the well settled policy against any post-verdict inquiry into the reasons or motives of jurors in the deliberation process. Claims of juror incompetence if sufficient in and of themselves to warrant a hearing would cast in doubt every jury verdict. As this Court has held:

> "It is well settled that only clear evidence of a juror's incompetence to understand the issues and to deliberate at the time of his service requires setting aside a verdict. And only strong evidence that it is likely that the juror suffered from such incompetence during jury service will justify an inquiry into whether such incompetence in fact did not." *United States* v. *Dioguardi,* 492 F.2d 70, 78 (2d Cir. 1974).

Appellant has failed to overcome the formidable policy barriers to any post-verdict inquiry of jurors as to how they reasoned. To permit such an inquiry would operate to embarrass or intimidate the juror. *Stein* v. *New York,* 346 U.S. 156, 178 (1953). A public fishing expedition into the private deliberation process of jurors would destroy the very "frankness and freedom" the jury system requires. *McDonald* v. *Pless,* 238 U.S. 264, 267-268, (1915). Since appellant's contention of juror incompetence lacks the substantiality that this Court has required (*Dioguardi, supra; Miller* v. *United States,* 403 F.2d 77 (2d Cir. 1969)), the verdict should not be consigned to an uncertain fate. The

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* Appellant's Supplemental Brief, p. 9.

strong policy against post-verdict inquiry into a juror's state of mind militates against any hearing. *United States* v. *Crosby*, 294 F.2d 928, 950 (2d Cir. 1961), *cert. denied sub. nom. Mittelman* v. *United States*, 368 U.S. 984 (1962).

Appellant's reliance upon *United States* v. *Flores*, 501 F.2d 1356 (2d Cir. 1974) and *United States* v. *Valot*, 473 F.2d 667 (2d Cir. 1973) is misplaced. *Flores* and *Valot* presented issues arising out of the operation of this Circuit's "Plan for Achieving Prompt Disposition of Criminal Cases" and a similar plan of the District Court of the Eastern District of New York. As was noted in *Flores* and *Valot* the very operation of the Plan requires hearings and findings of fact in order to provide a basis for relief and adequate review. The reasons for trial delay and the existence of "exceptional circumstances" require a hearing of a vastly different sort than one inquiring into a juror's state of mind.

The appellant should not be permitted to impeach the verdict of the jury on such a meagre showing. The strong policy against impeachment will not permit a post-verdict hearing and none should be granted.

CONCLUSION

The judgment of conviction should be affirmed.

Dated: March 17, 1975

Respectfully submitted,

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Brief for Appellee

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9th day of March 19 75

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